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Office of Administrative Law Judges
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In the matter of
Geanett A. Tyler
Claimant

Dated: May 30, 2001
Case No. 2000-DCW-0015

vs.

Washington Metropolitan Transit Authority
Employer

and
Director, Office of Workers' Compensation Programs
Party in Interest

ORDER OF REMAND

This case comes under the Longshore and Harbor Worker's Compensation Act (hereinafter "the Act"), 33 U.S.C. §§ 901, et seq. as extended by the District of Columbia Worker's Compensation Act, 36 D.C. Code §§ 501 et seq. On April 26, 2001 a hearing was held regarding whether an appropriate "manner and method" to recoup excess payments was properly taken by the Employer. Employer took the credit of $109,895.07 in such a way that the Claimant has received no benefits under the Act since August, 2000. The Claimant is *pro se* (unrepresented). The Employer Carrier is represented by Alan D. Sundberg, Esquire, Washington D.C. The Director is represented by Brian Ross, Esquire. Mr. Ross has requested an extension of time as the Director has a pending motion before the United States Circuit Court.

The Claimant is again reminded that she has a right to have an attorney or other qualified representative assist her in this case. A lawyer may be able to aid her in selecting the proper venue, assist her in the presentation of her case, identify potential exhibits, produce legal argument, provide her with legal research, assist her in identifying issues, identify potential witnesses, provide counsel at trial, as well as provide expertise in trial and appellate tactics. In fact, she may be entitled to free representation through a legal aid program, through a Bar Association program, or through a law school outreach program. If a claimant is eligible, there's no reason to turn down a free lawyer. Considering the complexity of the proceedings, the history of this claim and the amount of money involved, the Claimant should consider the use of qualified counsel.

Although her claim in chief is not properly before me, the Claimant maintains that she has been permanently and totally disabled from injuries sustained in 1975 and March 15, 1976.[1] The

[1] In a Decision and Order dated January 9, 1987, the claim was denied by an administrative law judge and the Benefits Review Board affirmed in a decision dated December 30, 1988. However, the U.S. Court of Appeals

Claimant wants reinstatement of a Decision and Order entered by the Benefits Review Board dated November 26, 1993, which held that the Claimant had been permanently and totally disabled.[2] This was modified by a Decision and Order of an administrative law judge dated July 17, 2000. The Benefits Review Board affirmed that decision in a Decision and Order issued February 7, 2001. That case has been appealed to the United States Court of Appeals District of Columbia Circuit. The Director has moved to have the appeal dismissed, but as of this date no action has been taken.[3]

The Employer imposed a credit, ostensibly leaving the Claimant without any income, and the Claimant purportedly was left destitute as a result. Normally, I am mandated to adjudicate all of the issues in one proceeding in order to avoid piecemeal litigation and needless procedural delay.

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for the D.C. Circuit, in a decision of October 16, 1990, found that the judge failed to inquire fully into the relevant evidence regarding causation and remanded the claim. In his second decision, dated March 8, 1993, the same administrative law judge found the Claimant to be entitled to permanent partial disability benefits at a rate of 30 percent. On November 26, 1993, the Benefits Review Board vacated that decision and modified it, finding the Claimant entitled to permanent total disability benefits because the Employer failed to establish the existence of suitable alternative employment, and remanded the case solely on the issue of entitlement to medical benefits. On remand, the case was transferred to Judge Charles P. Rippey, who awarded medical expenses in a Decision and Order Following Remand dated August 25, 1994, and determined that the issue of whether the Claimant could perform light work was not before him as modification had to be initiated before the district director.

[2] The Employer sought modification. The matter was again assigned to Judge Rippey, who denied the modification petition on July 26, 1996. However, this decision was vacated by the Benefits Review Board on June 30, 1997, as the case was remanded for consideration of the Employer's evidence as to the Claimant's capacity to work and the availability of suitable alternative employment and for a determination of whether the Employer established a basis for modification. The Board denied Claimant's Motion for Reconsideration on September 8, 1997. Claimant appealed to the U.S. Court of Appeals for the Federal Circuit, which determined that it did not have jurisdiction and transferred the case to the U.S. Court of Appeals for the D.C. Circuit in an Order issued as a mandate on January 20, 1998. The D.C. Circuit dismissed the appeal as interlocutory on May 1, 1998, and denied Claimant's rehearing petitions on July 10, 1998 and October 2, 1998. The case was returned to the Office of Administrative Law Judges, to be assigned to another judge because Judge Rippey had retired. However, due to the pending D.C. Circuit proceedings, the record was not received until June 11, 1999. Judge Neusner, who had first been assigned on remand, had to disqualify himself because he had participated as a temporary panel member in one of the Benefits Review Board's decisions relating to the Claimant. The case was therefore reassigned to Judge Pamela Wood, who decided the case on August 2, 2000.

[3] Early in the proceedings, I had advised the Claimant that she might have requested a stay and asked the court to remand the claim to me, to permit full review of her allegations of disability. The Claimant requested the Benefits Review Board to reconsider their prior decision on March 8, 2001. The Director has taken the position before the Court of Appeals that the appeal filed February 7, 2001 is premature and should be dismissed. There are instances when a modification request can be heard simultaneously with an appeal. *See* ***Wynn v. Clevenger Corp.,*** 21 BRBS 290 (1988). There are instances when modification is sought in a case pending before the Board, it will remand the case to an administrative law judge to consider the modification petition. The party who filed the original appeal may seek reinstatement of its appeal to the Board after the administrative law judge rules on the modification petition, and any aggrieved party may also appeal the decision on modification. ***Duran v. Interport Maintenance Corp.***, 27 BRBS 8 (1993). However, the Claimant has not requested it in this case.

Hudnall v. Jacksonville Shipyards, 17 BRBS 174 (1985); 20 C.F.R. §§ 702.338. In ***Delay v. Jones Washington Stevedoring Co.***, 31 BRBS 197 (1998), the Board held that Section 22 is not intended to be a back door for retrying or litigating an issue which could have been raised in the initial proceedings. I set the hearing as an humanitarian measure to afford the Claimant an opportunity to challenge the method and manner of taking the credit, and possibly obtain some income pending the outcome of her other actions.

With respect to the Employer's credit, there were no proceedings before the Director, as the Claimant did not wish to participate at that level. After a status conference, I issued an Interim Order, in part to give the Claimant another opportunity to obtain counsel. The Director now also requested that, after hearing, I decide how the employer may recoup the excess payments created by the modification order. The Claimant was advised that the issue would be limited to the credit issue. Her requests for subpoenas of witnesses relative to disability were denied, because she had a pending claim before the Benefits Review Board on her claim in chief. Although the Director had the authority to issue an order on the Employer's credit, because the Claimant chose not to participate in an informal conference, only a "recommendation" was issued. Had the Director issued an order it would not have been subject to challenge absent extraordinary circumstances, as the decision how to take the credit is discretionary, 33USC § 922.[4]

At hearing, the Claimant maintained the posture that the hearing involved issues that were not properly before me. During the course of the hearing, the Claimant was called to testify, limited to financial matters that relate to the manner and method of taking the credit. The testimony revealed that subsequent to the July 17 Decision and Order, the Claimant had obtained Supplemental Security Income. She was reluctant testify to questions concerning her income and resources. During cross examination of the Claimant by the Employer, she refused to answer:

> Q [By Mr. Sundberg][5] Since 1993. Is anyone else on the mortgage with you at that address?
> A No, that's very personal, Your Honor, I will not answer that.
> JUDGE SOLOMON: It's a matter of public record, ma'am. You can answer the question.
> THE WITNESS [Mrs. Tyler]: I need to tell him that?
> JUDGE SOLOMON: Sure, tell him. It's pertinent to your hardship situation.
> THE WITNESS: But that's not --
> JUDGE SOLOMON: Do you have a cosigner, do you have anybody else on a mortgage with you?
>
> [Time Passes.]
>
> Okay, so she's not going to answer the question. It is [a] public record. All you have to do go to the courthouse.
> THE WITNESS: I understand, but why should he have to drain me that he has –....

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[4] Under the terms of Section 22, excess payments of compensation made prior to an order decreasing the compensation rate may be deducted from future unpaid compensation, but only in such manner and by such method as determined by the District Director or an administrative law judge. Thus, while an employer may seek to recoup such excess payments through a credit against its ongoing compensation liability, any actions the employer takes to effectuate this credit are subject to the review of the district director, the administrative law judge, or both. *See 33 U.S.C. §922; 20* C.F.R. §702.373.

[5] Taken from the transcript (hereinafter "Tr") of the April 26 hearing. There is some question regarding the total accuracy of this transcription, but it generally represents the testimony. I added the bracketed entries.

JUDGE SOLOMON: It's the other way around, ma'am, this is an attempt to find out whether or not you have a hardship, whether or not --

THE WITNESS: I have an injury, Your Honor. What is this? Can I be dismissed, please. I really don't want to. I'm tired of being treated -- this is -- Your Honor --

[The claimant rose to leave.]

JUDGE SOLOMON: Ms. Tyler, I want you to sit down and listen to me for a second, okay. This whole proceeding is an attempt to try to help you.

[She left the witness stand.]

JUDGE SOLOMON: Ma'am, listen to me. Give me a chance to explain this to you. But Mr. Sundburg has a right, and as a representative of your Employer, to find out all this anyway. He's going to get to the nub of this anyway. He's only going to ask a couple more questions. So it's to your benefit to get the proceeding over with because maybe you will have some money in your pocket and maybe some of your expenses can get paid.

THE WITNESS: Your Honor, please.

JUDGE SOLOMON: Now, you have somebody here with you to help you --

THE WITNESS: Your Honor, do not force me to tell him that because he's talking about a recoupment --

...[further colloquy.]

JUDGE SOLOMON: And Mr. Ross did the same thing. So would you please at least try to give some degree of cooperation so we can get this over with. We're at two hours now. We're going on two hours now on a hearing that probably everybody said was going to take a half an hour. So just bear with us for a second and we'll try to get the record cleared up. And then, after we're done with the questioning, you will have an opportunity to tell me anything that you want to tell me about your case.

THE WITNESS: I just don't feel good.

JUDGE SOLOMON: And you can make --

THE WITNESS: I feel like I'm a -- can I go to the bathroom.

JUDGE SOLOMON: If you want to take a recess and we'll come back after lunch.

THE WITNESS: Your Honor, I don't want to come back. I don't want to be here.

JUDGE SOLOMON: Do you want to come back tomorrow?

(Witness leaves the hearing room.) [And did not return.]

TR, pp. 109-112.

Subsequently, after the hearing, I left the record open to take additional evidence and the Employer submitted Post Hearing Interrogatories at my behest on May 3, 2001. The Claimant did not respond. On May 23, I issued an Order to Compel answers. In an ex parte telephone message, she advised in essence, that she does not know how to address the Order.

In the modification proceeding before another administrative law judge, an "on the record" decision was entered, without a full hearing, due to the following:

As noted, a conference call was held on April 11, 2000. before the undersigned administrative law judge; her law clerk, Kelly McCormick, Esq.; the pro se Claimant, Geanett Tyler; and counsel for the Employer Washington Metropolitan Area Transit Authority, Alan D. Sundburg, Esq. The purpose of the conference call was to answer questions concerning the procedural posture of the case which the Claimant had raised during telephone calls with Ms. McCormick, in view of the prohibition against ex parte contacts. See 29 C.F.R. §§ 18.38(a). It was difficult conducting the telephone conference because Claimant frequently interrupted me, became agitated, and hung up (twice). I suggested to the Claimant that it would help me to decide the case if she would submit recent medical records or a recent statement from her treating physician. In response, Claimant became upset and maintained that she was unable to work but that her current condition was not at issue, based upon her own (incorrect) analysis of the law. Not only did

> Claimant decline my suggestion, but she became agitated and started crying, then hung up during the course of her own diatribe. Following the conference call, I decided to have a hearing on the record because it was clear that the Claimant was out of control and was unable or unwilling to comply with courtroom procedures.... Accordingly, I issued the followup (April 13, 2000) Order modifying the record and setting up a schedule for submission of evidence and briefing.

Decision and Order of Hon. Pamela Lakes Wood, dated July 17, 2000.

Many of the documents submitted by the Claimant have been irrelevant in substance and are in the nature of "stream of consciousness" in form. The Claimant is in apparent denial regarding the purpose of the hearing and the extent of my limited authority in this matter. For example, she can not/will not distinguish an "order" from a "brief". She can not distinguish the relative hierarchies of OALJ, the Benefits Review Board, the Federal District Court and the Court of Appeals.[6] My authority is recited in 29 C.F.R. §§ 18.29.[7] I do not have authority to hear issues properly before another court, especially an appellate court. The Claimant would have me usurp and supercede the authority of the Court of Appeals. The Director advises that the Court of Appeals has been asked to dismiss the Claimant's appeal on the merits, but as of this date a stay has not been issued.

Although I took measures to clarify the issues for the Claimant, her arguments and most of her testimony were continually irrelevant and were misdirected to her "disability" argument, rather than the credit issue. In an effort to provide the Claimant with a fair hearing, I attempted to help her develop a case relating to "method and manner" and establish hardship. I asked questions on her behalf. On several occasions I attempted to define the issue. The Claimant did not/ could not

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[6] The Claimant is committed to the "shotgun" approach, attempting to seek redress in as many venues as possible, in hope one will assert jurisdiction. She also alleged "disability" to the United States District Court for the District of Columbia, Case Number 00-2163, in another claim that was dismissed. At one time she had simultaneously brought the same issues before five separate tribunals: the Director, OALJ, BRB, USDC and the Circuit Court.

[7] It provides that I have all powers necessary to conduct a fair and impartial hearing, including, but not limited to, the following:

(1) Conduct hearings.

(2) Administer oaths and examine witnesses.

(3) Compel the production of documents and witnesses.

(4) Issue subpoenas.

(5) Issue decisions and orders.

(6) Exercise authority vested by the Administrative Procedure Act.

(7) Exercise the powers of the Secretary of Labor necessary to the conduct of the hearing.

(8) Act pursuant to the applicable ***Federal Rules of Civil Procedure***.

(9) Do all other things necessary to discharge the duties of the office.

acknowledge that the hearing was an opportunity to obtain some benefit from the issue. The Claimant appeared to become easily excited, highly agitated and was hostile to counsel. She did not apprehend that the Director's position was not necessarily antithetical or antagonistic to hers. She would not give direct answers to simple questions. Much of the testimony was not responsive. She repeatedly disrupted questioning and the testimony. If I accept her refusal to testify, her absence from the hearing and her language upon leaving literally, Ms. Tyler could be found to have requested withdrawal of the request for hearing. She presented no excuse for her refusal to testify and her refusal to participate further after her refusal to answer questions. She was offered an opportunity to continue the hearing. She did not take advantage of the offer. She did not explain her actions. Had she remained in the hearing room, she would have been given an opportunity to present the remainder of her case. The actions exhibited at hearing are similar to those documented in her April 2000 telephone conference, before another administrative law judge. The Claimant either decompensated or she has chosen not to proceed further.

I have several options, including:

- *Dismissal*. A failure to comply with the Order to Compel, within the prescribed time limits can be deemed an abandonment of the claim under 29 C.F.R. §18.39(b) and a refusal to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure can result in dismissal. *See* ***Hammond Packing Company v. Arkansas***, 212 U.S. 322 (1909). Repeated and numerous abuses of the administrative process by a party may constitute grounds for dismissal with prejudice, ***Harrison v. Barrett Smith, Inc.,*** 24 BRBS 257 (1991).
- *Contempt*. A Claimant has a duty to co-operate with the tribunal. A failure may result in sanctions for contempt. Pursuant to Section 27(b), the district courts may punish as contempt of court any disobedience or resistance to a lawful order or process issued in the course of administrative proceedings under the LHWCA. ***Stevedoring Services of America, Inc. v. Eggert***, 953 F.2d 552, 555, 25 BRBS 92, 96 (CRT) (9th Cir.), cert. denied, 505 U.S. 1230, 112 S.Ct. 3056 (1992) Pursuant to the 1972 amendments, an administrative law judge must certify the facts concerning such action to the District Court.
- *Other Sanctions*. I may also draw an adverse inference against the Claimant, concluding that where a party does not submit evidence within her control, that evidence is unfavorable. ***Cioffi v. Bethlehem Steel Corp.***, 15 BRBS 201 (1982); ***Hansen v. Oilfield Safety***, 8 BRBS 835, *aff'd on recon.*, 9 BRBS 490 (1978), *aff'd sub nom*. ***Oilfield Safety & Mach. Specialties v. Harman Unlimited***, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980).

However, given my observation of the Claimant, and after a review of the record, in an abundance of caution, Ms. Tyler may not have the capacity to understand the nature of this proceeding. She may have a medical reason for her confusion. She has been unable to competently represent herself. If she were competent, her actions at hearing could constitute contempt and/or I have authority to dismiss her claim by reason of failure to cooperate, abandonment or withdrawal. However, the following may be applicable:

33 USC §§ 911. Guardian for minor or incompetent
The deputy commissioner[8] may require the appointment by a court of competent jurisdiction, for any person who is mentally incompetent or a minor, of a guardian or other representative to receive compensation payable to such person under this Act and to exercise the powers granted to or to perform the duties required of such person under this Act.

I do not have the authority to have the Claimant evaluated for competency. I do not have authority to appoint a guardian. I also do not have authority to appoint counsel. However, the Director has discretion to do so. If the Claimant lacks capacity to represent herself, the Director may obtain a guardianship[9] and appoint counsel to represent the Claimant.

Meanwhile, the Claimant advises that she has new medical impairments relating to her claim. It may be that these are relevant to her claim; they may also constitute a request for modification. Ms. Tyler alleges that she now has a loss of vision.[10] Remand will give the Claimant an opportunity to permit the Department of Labor to investigate these allegations.

Remand will also give the Claimant another opportunity to obtain counsel. It will also promote judicial and administrative economy, as all matters may be vested in the same body.

Now, **therefore**, the following is **ORDERED**:

1. The claim is remanded to the Director, District No. 4 to take measures consistent with the body of this decision.
2. The briefing schedule is cancelled.
3. The Director will investigate the Claimant's new medical allegations concerning the extent of her disability.
4. The Director's request for an extension of time is now moot, and is denied.
5. The Claimant is directed to cooperate fully with the Director. **Failure to do so, without a justifiable excuse, may result in dismissal of this claim.**

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Daniel F. Solomon
Administrative Law Judge

[8] The position of Director, Office of Workers' Compensation Programs has succeeded to the position of Deputy Commissioner.

[9] The Director may have the Claimant examined by a psychologist and/or psychiatrist to determine whether she is competent to represent herself. If so, I recommend administration of an MMPI and WAIS III (or their equivalents) prior to examination by a psychiatrist.

[10] This allegation may depend whether or not she has been competent to perfect the issue.